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Docket Number

SUPREME COURT OF THE UNITED STATES

Biomedino, L.L.C.

Petitioner

v.

Waters Technology Corporation, General Electric Company (doing business as GE Healthcare), and Agilent Technologies, Incorporated

Respondents

On Petition for Writ of Certiorari to the United States Court of Appeals for the Federal Circuit

Petition for Writ of Certiorari

Edward W. Goldstein, Esq.
Attorney of Record
GOLDSTEIN, FAUCETT & PREBEG, LLP
1177 West Loop South, Suite 400
Houston, TX 77027
Telephone: (713) 877-1515
Facsimile: (713) 877-1737

Counsel for Petitioner Biomedino, LLC

QUESTIONS PRESENTED

1. Did the courts below improperly ignore the evidence, both intrinsic and extrinsic, showing the understanding of a person of skill in the art as it related to the patentee's disclosure of structure?

2. Did the courts below apply the proper weight to the statutory presumption of validity accorded an issued patent, under 35 U.S.C. § 282, before finding a claim term indefinite?

3. Is the courts' determination that "control means" lacks sufficient structure on its own to overcome the means-plus-function presumption consistent with previous Federal Circuit opinions?

4. Is the disclosure of the structures "Control" and "control equipment" sufficient to satisfy the requirement of corresponding structure, material or acts required by 35 U.S.C. § 112, ¶ 6?

CORPORATE DISCLOSURE STATEMENT

No parent or publicly held company owns 10% or more of the petitioner corporation's stock.

PARTIES TO THE PROCEEDINGS

Biomedino, L.L.C.
Waters Corporation
General Electric Company d/b/a GE Healthcare
Agilent Technologies, Incorporated

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JURISDICTIONAL BASIS

On November 11, 2005, the District Court for the Western District of Washington issued its Order Construing Claims of the '502 patent. Plaintiff'-Petitioner then filed a timely Request for Reconsideration, which was subsequently denied on January 11, 2006. Following the parties request for a final judgment, on March 16, 2006 the District Court issued its Order Under Rule 54(b) of the Federal Rules of Civil Procedure, holding Claims 13-17 and 40 of U.S. Patent No. 6,602,502 invalid for indefiniteness. Plaintiff-Petitioner appealed to the Court of Appeals for the Federal Circuit. The Federal Circuit entered judgment affirming the holding of the District Court on June 18, 2007. Petitioner seeks review by writ of certiorari under 28 U.S.C. § 254(1).

STATUTES INVOLVED

Relevant Sections of The Patent Act

§ 112. Specification

The specification shall contain a written description of the invention, and of the manner and process of making and using it, in such full, clear, concise, and exact terms as to enable any person skilled in the art to which it pertains, or with which it is most nearly connected, to make and use the same, and shall set forth the best mode contemplated by the inventor of carrying out his invention.

The specification shall conclude with one or more claims particularly pointing out and distinctly claiming the subject matter which the applicant regards as his invention.

A claim may be written in independent or, if the nature of the case admits, in dependent or multiple dependent form.

Subject to the following paragraph, a claim in dependent form shall contain a reference to a claim previously set forth and then specify a further limitation of the subject matter claimed. A claim in dependent form shall be construed to incorporate by reference all the limitations of the claim to which it refers.

A claim in multiple dependent form shall contain a reference, in the alternative only, to more than one claim previously set forth and then specify a further

limitation of the subject matter claimed. A multiple dependent claim shall not serve as a basis for any other multiple dependent claim. A multiple dependent claim shall be construed to incorporate by reference all the limitations of the particular claim in relation to which it is being considered.

An element in a claim for a combination may be expressed as a means or step for performing a specified function without the recital of structure, material, or acts in support thereof, and such claim shall be construed to cover the corresponding structure, material, or acts described in the specification and equivalents thereof. 35 U.S.C. § 112 (2007).

§ 282. Presumption of validity; defenses
A patent shall be presumed valid. Each claim of a patent (whether in independent, dependent, or multiple dependent form) shall be presumed valid independently of the validity of other claims; dependent or multiple dependent claims shall be presumed valid even though dependent upon an invalid claim. Notwithstanding the preceding sentence, if a claim to a composition of matter is held invalid and that claim was the basis of a determination of nonobviousness under section 103(b)(1), the process shall no longer be considered nonobvious solely on the basis of section 103(b)(1). The burden of establishing invalidity of a patent or any claim thereof shall rest on the party asserting such invalidity.

The following shall be defenses in any action

involving the validity or infringement of a patent and shall be pleaded:

> (1) Noninfringement, absence of liability for infringement or unenforceability,
> (2) Invalidity of the patent or any claim in suit on any ground specified in part II of this title as a condition for patentability,
> (3) Invalidity of the patent or any claim in suit for failure to comply with any requirement of sections 112 or 251 of this title.
> (4) Any other fact or act made a defense by this title.

In actions involving the validity or infringement of a patent the party asserting invalidity or non-infringement shall give notice in the pleadings or otherwise in writing to the adverse party at least thirty days before the trial, of the country, number, date, and name of the patentee of any patent, the title, date, and page numbers of any publication to be relied upon as anticipation of the patent in suit or, except in actions in the United States Claims Court, as showing the state of the art, and the name and address of any person who may be relied upon as the prior inventor or as having prior knowledge of or as having previously used or offered for sale the invention of the patent in suit. In the absence of such notice proof of the said matters may not be made at the trial except on such terms as the court requires. Invalidity of the extension of a patent term or any portion thereof under section 154(b) or 156 of this title because of the material failure—

(1) by the applicant for the extension, or
(2) by the Director,

to comply with the requirements of such section shall be a defense in any action involving the infringement of a patent during the period of the extension of its term and shall be pleaded. A due diligence determination under section 156(d)(2) is not subject to review in such an action.

STATEMENT OF THE CASE

Petitioner, Biomedino, L.L.C. ("Biomedino"), filed its action for patent infringement in the United States District Court for the Western District of Washington Seattle Division (Case No. CV05-0042L) on January 7, 2005, alleging that Respondents, Waters Technologies, Corporation, General Electric Company, and Agilent Technologies, Incorporated (collectively referred to as "Respondents"), infringe Claims 13-17 and 40 of U.S. Patent No. 6,602,502 (referred to herein as "the '502 patent," attached hereto at 72a-114a). The District Court exercised original jurisdiction over Biomedino's cause of action for infringement under 28 U.S.C. § 1338(a).

The parties subsequently filed their opening claim construction briefs on October 5, 2005 and their responsive briefing on October 26, 2005. Following a *Markman* hearing on November 17, 2005, Judge Lasnik issued the District Court's Order Construing Claims of the '502 Patent. (20a-40a). The November 22, 2005 Order found Claims 13-17 and 40 to be indefinite for failing to "disclose a structure corresponding to 'control means'". (35a). The disputed phrase "control means," is found in Claims 13 and 40, which contain the phrases "control means for automatically operating said valving" and "control means for automatically operating said valves", respectively. For sake of brevity, the phrases are referred to as simply "control means". Claims 14-17 depend from Claim 13; therefore, the phrase "control means" is included in those claims as well.

The District Court found "control means" to be a means-plus-function limitation under 35 U.S.C. § 112, ¶ 6 but also found it to be lacking the proper supporting structure required by that section. (32a-35a). Claims 13-17 and 40 were therefore indefinite under § 112, ¶ 2 for failing to point out with particularity "the subject matter which the applicant regards as his invention." 35 U.S.C. § 112, ¶ 2.

Biomedino requested that the District Court reconsider its claim construction Order; however, following briefing by all parties, that request was denied on January 11, 2006. (Order Denying Request for Reconsideration at 18a-19a). The parties then filed an agreed motion for judgment under Rule 54(d) of the Federal Rules of Civil Procedure, which was granted by Judge Lasnik on March 16, 2006, ordering that "claims 13-17 and 40 of United States Patent No. 6,602,502 are indefinite and are therefore invalid for failing to satisfy the requirements of 35 U.S.C. § 112, ¶ 2." (Judgment under Rule 54(b), at 16a-17a). Biomedino then filed its Notice of Appeal to the Court of Appeals for the Federal Circuit on April 11, 2006.

The Federal Circuit heard oral arguments from the parties on March 7, 2007, and on June 18, 2007, issued its Opinion affirming the judgment of the District Court. (1a-15a). Biomedino now files this timely Petition for Writ of Certiorari seeking review of the lower courts' holdings.

ARGUMENT

I. INTRODUCTION

Biomedino appeals the holdings of both the District Court and the Court of Appeals for the Federal Circuit finding Claims 13-17 and 40 of U.S. Patent No. 6,602,502 invalid for indefiniteness. The finding of invalidity is contrary to the current jurisprudence from this Court and from the Federal Circuit, requiring a finding of indefiniteness only where a claim term is capable of no construction whatsoever. The disputed, "control means" limitation, found in Claims 13-17 and 40 of the '502 patent, is capable of being construed and is in fact definite as required by 35 U.S.C. § 112, ¶ 2. The claims of the '502 patent are therefore not invalid, as is the presumption under 35 U.S.C. § 282.

A. The '502 patent

The '502 patent is directed generally toward methods and devices for removing target species from fluids. The claims at issue involve the use of substantially specific binding in combination with automated regeneration in order to efficiently remove target species from fluids. A fluid containing the target species is passed through a column or passage containing a substantially specific binder. The target species are bound by that substantially specific binder with a high degree of specificity causing them to be pulled out of the fluid, while those species that are not substantially specific to the binder are, for the most part, allowed to pass

through. Removal of the species from a fluid using a substantially specific binder is useful in applications such as analytical and preparative chromatography wherein the substantially specific binder is bound to a stationary phase contained within a column or other passage.

The invention described in the asserted claims of the '502 patent includes the addition of an automated system for regenerating the substantially specific binder. Once the fluid has been passed over the substantially specific binding agent and the desired species have been bound, in order to reuse the system, the bound species must be un-bound in order for the binder to be ready to be used again. The '502 patent discloses an automated system for this regeneration of the binder in preparation for another round of binding the target species.

Biomedino has alleged that the Respondents infringe Claims 13-17 and 40 of the '502 patent. Claims 13-17 relate to a device with a passage through which a fluid containing the species to be separated is passed. The passage contains binding means for binding the target species substantially specifically and exposure means for exposing the binding means to the species and also for preventing the binding means from leaving the device. The invention further includes a step of connecting the passage, by valving, to an automatically controlled closed regeneration means that separates the bound species from the binding means in order to regenerate the system. Claim 40 is directed to the regeneration device itself.

B. Control Means

The phrases "control means for automatically operating said valving" and "control means for automatically operating said valves" appear in Claims 13 and 40, respectively. (108a, 113a). Both phrases will be referred to interchangeably herein as "control means," as the difference in "valving" and "valves" is not relevant to Biomedino's appeal. Claims 14-17 of the '502 patent depend from Claim 13, and therefore include the phrase "control means" as well. (108a-109a). The control means, as described in the specification and shown in Figure 6 of the '502 patent, serve the purpose of operating the valving in order to control the entire process of regenerating the binding means. (104a).

II. STANDARDS

A. Claim construction is reviewed *de novo*.

Matters of claim construction are to be reviewed *de novo* on appeal. Determinations of whether a claim limitation is in means-plus-function form under 35 U.S.C. § 112, ¶ 6 and whether a claim is invalid for indefiniteness under 35 U.S.C. § 112, ¶ 2, are legal conclusions undertaken as part of the court's claim construction duties. *Robinson v. Cannondale Corp.*, 81 Fed. Appx. 725, 728 (Fed. Cir. 2003)(citing *Personalized Media Communications v. Int'l Trade Comm'n*, 161 F.3d 696, 702 (Fed. Cir. 1998); *Intellectual Prop. Dev., Inc. v. Communications Patents, LTD.*, 336 F.3d 1308, 1318

(Fed. Cir. 2003)(citing *Atmel Corp. v. Info Storage Devides, Inc.*, 198 F.3d 1374, 1378 (Fed. Cir. 1999)).

B. Claims of a patent are afforded a presumption of validity.

The evidentiary standard for finding a patent invalid is that of clear and convincing evidence. Claims of a patent are to be presumed valid, placing the burden on the Respondents to show, by clear and convincing evidence, any facts supporting a finding of invalidity. 35 U.S.C. § 282; *Ultra-Tex Surfaces, Inc. v. Hill Bros. Chem. Co.*, 204 F.3d 1360, 1367 (Fed. Cir. 2000). A challenge to a claim containing a means-plus-function limitation as lacking structural support requires a finding, by clear and convincing evidence, that the specification lacks disclosure of structure sufficient to be understood by one skilled in the art as being adequate to perform the recited function." *Budde v. Harley-Davidson, Inc.*, 250 F.3d 1369, 1376-77 (Fed. Cir. 2001). Where the decision is a close one, it is "properly resolved in favor of the patentee." *Exxon Research and Eng'g Co. v. United States*, 265 F.3d 1371, 1380 (Fed. Cir. 2001); *Bancorp Servs., L.L.C. v. Hartford Life Ins. Co.*, 359 F.3d 1367, 1371 (Fed. Cir. 2004).

III. THE MEANS-PLUS-FUNCTION PRESUMPTION IS REBUTTED.

Because the "control means" limitations in both Claims 13 and 40 contain the word "means" and recite a function of "automatically operating said

valves [or valving]," the construing court must presume that the limitation is in means-plus-function form and subject to the constraints of 35 U.S.C. § 112, ¶ 6; however, that "presumption can be rebutted where the claim, in addition to the functional language, recites structure sufficient to perform the claimed function." *Altiris, Inc. v. Symantec Corp.*, 318 F.3d 1363, 1375 (Fed. Cir. 2003) **Error! Bookmark not defined.**(citing *Sage Prods., Inc. v. Devon Indus., Inc.*, 126 F.3d 1420, 1427 (Fed. Cir. 1997)). In this instance, "control," on its own, imparts structure to the claim language, as would "a control" or "a controller," taking it out of the purview of § 112, ¶ 6.

The District Court and the Federal Circuit appear to have ignored the evidence produced by the Respondents (not Petitioner) that "control" denotes structure to a person of ordinary skill in the art. Respondent Waters' proffered expert, Dr. Hage, testified at the claim construction hearing that, at the time of Dr. Strahilevitz's invention, "control" was understood by those of skill in the art to include "pneumatic, hydraulic, mechanical, [or] electrical" actuation. (See *Markman* transcript, at 49a). A claim term should be found to include sufficient structure to over come the means-plus-function presumption "if the term, as the name for structure, has a reasonably well understood meaning in the art." *Allen Eng'g Corp. v. Bartell Indus.*, 299 F.3d 1336, 1347 (Fed. Cir. 2002) (quoting *Watts v. XL Sys., Inc.*, 232 F.3d 877, 880-81 (Fed. Cir. 2000)(internal quotations omitted). It is clear from the testimony of the Respondent's expert that

"control," as a name for a structure, has a reasonably well understood meaning in the art.

There was also intrinsic evidence before both the District Court and the Federal Circuit showing that "control" is the name for a structure and has a reasonably well-understood meaning in the art. The Kirk-Othmer reference, published in the 1966 Encyclopedia of Chemical Technology, was cited on the face of the '502 patent and discloses that a timer is a type of control. (70a). The Kitchen patent (U.S. 3,257,314, attached at 115a-134a), filed ten years before the application which led to the '502 patent and also cited on the face of the '502 patent, discloses several types of controls for valves known in the art at the time of Dr. Strahilevitz's invention. (See e.g. 121a-122a).

The District Court should therefore have found that a control, and more specifically a control for automatically operating valves/valving, is a "precise structure well understood by those of skill in the art [and a]ccordingly, the word 'means' in [Claims 13-17 and 40] may be ignored." *Allen Eng'g Corp.*, 299 F.3d at 1348. The District Court's finding of "control" to lack sufficient structure for overcoming the means-plus-function presumption, and the Federal Circuit's affirmance of that finding, are in conflict with previous decisions handed down by the Federal Circuit. Notably, in *Envirco Corp. v. Clestra Cleanroom,* the court found that in the phrase "second baffle means," presumably a means-plus-function limitation, "the term 'baffle' itself is a structural term" based in part on its common

dictionary definition, thereby overcoming the means-plus-function presumption. *Envirco Corp. v. Clestra Cleanroom Inc.*, 209 F.3d 1360, 1364-65 (Fed. Cir. 2000). The dictionary definition of "control" was before the District Court and the Federal Circuit, although seemingly not taken into account. "Control" refers to "an instrument or set of instruments used to operate, regulate, or guide a machine or vehicle." *The American Heritage Dictionary of the English Language*, 4th Ed., Houghton Mifflin Co. (2000).

The finding by the District Court and Federal Circuit that "control" is not itself structure sufficient to avoid application of § 112, ¶6, is also at odds with the Federal Circuit's decision in *Cole v. Kimberly Clark*, where the court found the phrase "perforation means for tearing" to recite "structure supporting the tearing function (i.e., perforations)." *Cole v. Kimberly-Clark Corp.*, 102 F.3d 524, 531 (Fed. Cir. 1996) (The "claim drafter's perfunctory addition of the word "means" did nothing to diminish the precise structural character of this element"). "[W]ords in a patent claim are construed as they would be understood by a reader skilled in the relevant art unless it appears that the inventor used the words differently." *Id.* Since there is no evidence to suggest that "control" is used in any manner other than as understood by those skilled in the art, the District Court should have looked to the term's ordinary meaning as evidenced by the intrinsic and extrinsic evidence discussed above. *See Id.* Because the term "control means" recites structure, it does not qualify for treatment under § 112, ¶ 6 and

is not limited to only the corresponding structure disclosed the in '502 patent's specification. 35 U.S.C. § 112, ¶ 6; *Envirco Corp.*, 209 F.3d at 1365. "Control means" should therefore be construed as it would be by one skilled in the art according to the standard claim construction rules. *Id.*

IV. "CONTROL MEANS" IS NOT INDEFINITE

A. A means-plus-function limitation must disclose structure.

The requirement that a patent claim be sufficiently definite is stated in Section 112, paragraph 2: "The specification shall conclude with one or more claims particularly pointing out and distinctly claiming the subject matter which the applicant regards as his invention." 35 U.S.C. § 112, ¶ 2. In order for a claim containing a means-plus-function limitation to meet the particularity requirement in paragraph two, the corresponding structure associated with the "means-plus-function limitation must be disclosed in the written description in such a manner that one skilled in the art will know and understand what structure corresponds to the means limitation." *Atmel* 198 F.3d at 1382. This requirement is found in § 112, ¶ 6:

> An element in a claim for a combination may be expressed as a means or step for performing a specified function without the recital of structure, material, or acts in support thereof, and such claim shall

> be construed to cover the corresponding structure, material, or acts described in the specification and equivalents thereof.

35 U.S.C. § 112, ¶ 6. A failure to disclose adequate structure corresponding to the claimed function results in the claim being indefinite under § 112, ¶ 2, and therefore invalid. *Intellectual Prop. Dev.*, 336 F.3d at 1319. The requirements found in paragraphs 2 and 6 of Section 112 "cannot be satisfied when there is a total omission of structure." *Atmel* 198 F.3d at 1382 (emphasis added). The disclosure of structure need not be perfectly clear because "the knowledge of one skilled in the particular art may be used to understand what structure(s) the specification discloses." *Id.* The indefiniteness inquiry under the second and sixth paragraphs of section 112 turns on whether a person of ordinary skill in the art would understand the scope of the claim when read in light of the specification. *Id.* at 1319 (citing *N. Am. Vaccine, Inc. v. Am. Cyanamid Co.*, 7 F.3d 1571, 1579 (Fed. Cir. 1993)); *see also Atmel Corp.*, 198 F.3d at 1378 (the requirement that claims be evaluated from the viewpoint of one skilled in the art applies equally to claims in means-plus-function format). The fundamental question is whether the claims "when read in light of the specification reasonably apprise those skilled in the art of the scope of the invention." *S3, Inc. v. Nvidia Corp.*, 259 F.3d 1364, 1367 (Fed. Cir. 2001).

B. The '502 patent's specification discloses structures: "Control" and "Control equipment."

Each of a patent's claims must comply with Section 112, paragraph 2 of The Patent Act, which requires first that a claim "set forth what the applicant regards as his invention," and secondly, that it do so with sufficient definiteness. *Allen Eng'g*, 299 F.3d at 1348 (quoting *Solomon v. Kimberly-Clark Corp.*, 216 F.3d 1372, 1377 (Fed. Cir. 2000)) (internal quotations omitted). In making its determination of definiteness, a court must "analyze whether 'one skilled in the art would understand the bounds of the claim when read in light of the specification.'" *Allen Eng'g*, 299 F.3d at 1348 (quoting *Personalized Media*, 161 F.3d at 705)).

If the claim contains a means-plus-function limitation, the patentee must disclose in the specification some structure capable of performing the recited function. 35 U.S.C. § 112, ¶ 6. In construing a means-plus-function term, the court must first define the claimed function and secondly identify the corresponding structure capable of performing that function. *See Intellectual Prop. Dev.*, 336 F.3d at 1319. Here, the parties appear to agree that the function of the "control means" limitation is to automatically control the valves or valving and further agree that the specification contains two references to "control means": a box labeled "Control" is shown attached to the valves or valving in Figure 6 of the specification, and the specification contains a statement that "[t]he entire

process of regenerating the antibody may be controlled automatically by known differential pressure, valving and control equipment." (104a). The indefiniteness inquiry thus centers on whether or not these two disclosures adequately identify, to a person of skill in the art, structure capable of performing the function of "automatically operating said valves [or valving]." *See Budde*, 250 F.3d at 1376. The District Court and the Court of Appeals for the Federal Circuit appear to have failed to ask whether "Control" and "control equipment" disclose structure to someone skilled in the art of chromatography.

The understanding of a person skilled in the art at the time of the filing of the application leading to the '502 patent is memorialized in two pieces of intrinsic evidence incorporated by reference into the '502 patent—the Kitchen patent (115a-134a) and the Kirk-Othmer encyclopedia reference (53a-71a). Because the definition of "control" is at the center of both the means-plus-function presumption analysis and the definiteness analysis, these references are applicable both inquiries. It must be noted that these references are not intended to substitute for the disclosure of structure required by Section 112 but instead show how the disclosed structures, "Control" and "control equipment," were understood by those in the art at the time of the invention. The Kitchen patent shows that, as of June 21, 1966 (almost six years before Dr. Strahilevitz's filing), it was known in the art that control equipment for operating valves included pneumatic, hydraulic, and electrical actuators. (See e.g. 121a-122a and 128a).

The Kirk-Othmer reference, also from 1966, shows that a timer was known as equipment for controlling "valves, pumps, etc." (70a).

The Respondents own expert at the *Markman* hearing also provided his understanding of what was known in the art as of 1972 to be a "Control," as shown in Figure 6, or "control equipment" as referenced in the specification. When asked, "What could possibly have been used in 1972 in order to automatically operate the valves?" his response was, "Well, there are many ways of operating valves even at that date. There was pneumatic, hydraulic, mechanical, electrical means of actuation...It could have been a pH sensor...There are many possibilities." (See 49a (testimony of Professor David Hage)). A patentee is not required to include in the specification "subject matter that is known in the field of the invention and is in the prior art, for patents are written for persons experienced in the field of the invention." *S3 Inc.*, 259 F.3d at 1371 (a "selector" was found to be a sufficient recitation of structure despite lacking "the electronic structure of the selector and the details of its electronic operation" because a selector was "of well known electronic structure" and performed "a common electronic function").

It is clear that the '502 patent's disclosure of "Control' and "control equipment" is understood by a person of ordinary skill in the art to be a recitation of structure capable of performing the function of automatically operating the valves or valving. The disclosure need not be explicit or perfect. *Atmel*

Corp., 198 F.3d at 1380; *Exxon Research*, 265 F.3d at 1376 ("By finding claims indefinite only if reasonable efforts at claim construction prove futile, we accord respect to the statutory presumption of validity"). If a claim term can be given any reasonable meaning, it is not indefinite. *Datamize, LLC v. Plumtree Software, Inc.*, 417 F.3d 1342, 1347 (Fed. Cir. 2005). Here a reasonable meaning for "control" has been supplied to the District Court and has been disregarded. "Control means" refers to a "Control" and known "control equipment" in addition to the equivalents thereto, which are understood by people of skill in the art to include at least timers, pneumatic, hydraulic, mechanical and electrical actuators, sensors, and their equivalent structures. *See* 35 U.S.C. § 112, ¶ 6. This is a sufficient disclosure of structure to give notice to those of ordinary skill in the art as to the scope of Dr. Strahilevitz's invention. This is not an instance where no possible construction can be found.

Because the '502 patent is afforded a presumption of validity, the Respondents are required to show, by clear and convincing evidence, that these two disclosures do not allow a person of skill in the art to discern the scope of Claims 13-17 and 40. *See Ultra-Tex Surfaces*, 204 F.3d at 1367; *Budde*, 250 F.3d at 1376-77. The clear and convincing evidence standard "lies somewhere in between the 'beyond a reasonable doubt' and the 'preponderance of the evidence' standards of proof." *Pfizer, Inc. v. Apotex, Inc.*, 480 F.3d 1348, 1360 (Fed. Cir. 2007)(internal citations omitted). Clear and convincing evidence requires from the "factfinder an

abiding conviction that the truth of its factual contentions are highly probable." *Id.* at 1360 (citing *Colorado v. New Mexico*, 467 U.S. 310, 316, 104 S. Ct. 2433, 81 L. Ed. 2d 247 (1984)); *Buildex, Inc. v. Kason Industries, Inc.*, 849 F.2d 1461, 1463 (Fed. Cir. 1988). Rather than showing by clear and convincing evidence that "control means" is not capable of any construction, the Respondents have shown, through their expert, that "Control" and "control equipment" in fact denote structure such as actuators and sensors. The intrinsic evidence shows that "control equipment" includes timers in addition to actuators and sensors. Respondents did not show at the *Markman* hearing, or otherwise, that a fact finder would have an "abiding conviction" that a person of ordinary skill in the art would probably find the term "control means" to be indefinite. It is unclear what standard the lower courts used in finding the '502 patent to be indefinite. Because the correct deference has not been given to an issued patent and because the District Court failed to construe "control means" consistently with the disclosed structures, both the Federal Circuit and District Court should be reversed and the matter remanded for further claim construction.

V. CONCLUSION

The Petitioner presented sufficient evidence to the District Court through the claim construction proceedings to show that the limitation "control means" is not in means-plus-function format under § 112, ¶ 6. "Control" denotes enough structure on its

own to rebut the presumption that the phrase containing the word "means" is a means-plus-function limitation and therefore limited to only the structures disclosed in the specification and their equivalents.

Even assuming that "control means for automatically operating said valving [or valves]" is a means-plus-function limitation, there is sufficient structure recited in the specification to identify structure to a person of skill in the art. "Control means" is therefore not indefinite as determined by the District Court and as affirmed by the Court of Appeals for the Federal Circuit. The matter should be remanded to the District Court in order that it may apply the proper claim construction to the disputed term.

Respectfully submitted,

Edward W. Goldstein, Esq.
Attorney of Record
GOLDSTEIN, FAUCETT &
PREBEG, LLP
1177 West Loop South,
Suite 400
Houston, TX 77027
Telephone: (713) 877-1515
Facsimile: (713) 877-1737

Counsel for Petitioner
Biomedino, LLC

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